No. 96-270 (21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., *et al.*,

Petitioners,

—v.—

GEORGE WINDSOR, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS AILEEN CARGILE, *ET AL.*

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STATEMENT

The rulings of the courts below represent two extreme and opposite interpretations of the significance of settlement on class certification under Rule 23. While the district court allowed the existence of a settlement to substitute for satisfaction of the requirements of Rule 23, the court of appeals broadly held that settlement is irrelevant to class certification. Neither approach is correct.

Rule 23 mandates that courts adopt a middle ground that recognizes the relevance of settlement to a number of Rule 23 requirements, an approach actually followed by the Third Circuit (despite its overbroad holding). However, settlement, by

itself, cannot establish the required predominance of common issues over individual questions that is at the heart of a Rule 23(b)(3) action. Moreover, the right to opt-out of such actions must be meaningful. Because common issues did not predominate, and the opt-out right was illusory, the class certification in this case was improper. And the Third Circuit, therefore, should be affirmed.

This brief is filed on behalf of six Californians, all of whom have either contracted mesothelioma or are at risk of contracting it in the future. Mesothelioma, though rare, is the most lethal form of asbestos disease—invariably fatal within two years of diagnosis. Those individuals who actually contracted mesothelioma—John Soteriou, Harold Hans Emmerich and Thomas Corey—were first diagnosed shortly *after* the period for exercising a right to opt-out of the class had expired. JA 921-23. None of the three received actual or published notice of the class action; all three have since died.[1] The remaining three respondents—Aileen Cargile, Betty Francom, and John Wong—believe that the Settlement class certification did not take into account the interests of California residents, particularly those who will contract mesothelioma.[2] Both Mrs. Cargile and Mrs. Francom have an intimate understanding of mesothelioma; they each watched their long-time spouses die of the disease. JA 337-38, 348-49.

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[1] The claims of these men are now being pursued by their successors in interest. This Court granted the Motion of Respondents Aileen Cargile, *et al.* to Substitute Parties on January 6, 1997.

[2] These individuals filed a motion to certify an opt-out class of all California residents who have contracted or will contract mesothelioma. They have not consented to jurisdiction in this matter. *In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). They asserted that the "benefits" of the Settlement provide little or nothing to California residents who already enjoy these or greater benefits under the unique California law. The district court denied the motion. *See* Order, filed September 2, 1994, Docket No. 1156.

1. RELEVANT BACKGROUND AND TERMS OF SETTLEMENT

Procedural Posture.—Simultaneously, on January 15, 1993 the named plaintiffs filed a class complaint,[3] the defendants, the Center for Claims Resolution (CCR), filed an answer, and those parties ("the Settling Parties") jointly filed a Stipulation of Settlement (the "Settlement") and a motion for class certification. Pet. App. 23a-24a. The district court granted the motion two weeks later. Pet. App. 26a. The district court issued final approval of class certification and ruled that the Settlement was fair on August 16, 1994. Pet. App. 29a. The court later entered a preliminary injunction, prohibiting the class members from filing suit against CCR until a final judgment was entered. Pet. App. 30a.

To date, the district court has *not* entered a final, appealable judgment in this action. Judgment cannot be entered because settlement of this action was expressly conditioned upon CCR's insurers assuming liability; a third-party action filed by CCR against its insurers to resolve coverage remains pending.[4] Pet. App. 24a n.4, 34a. Since no final judgment has been entered below, an appeal of the district court's fairness determination would be premature.[5] This appeal is thus only from

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[3] The complaint asserts various theories of liability, including negligent failure to warn, strict liability, breach of warranty, emotional distress, enhanced risk of disease, medical monitoring and civil conspiracy. Pet. App. 24a.

[4] The Settlement, by its own terms, is premised upon each of the members of CCR obtaining certain assurances from their insurers regarding coverage under existing general insurance policies. JA 99-100. If the pending third party action results in a denial of coverage, the Settlement will not become effective. JA 99. Despite the fact that the third party action against the CCR insurers has been pending for nearly four years, there has been virtually no activity in the case. To date, the district court has not even set a trial date in that action.

[5] Petitioners repeatedly imply that Respondents either chose not to challenge the fairness of the Settlement, or have somehow forsaken such arguments. *See, e.g.*, Brief for Petitioners at 15. Since the time for

the district court's issuance of the preliminary injunction, which bars class members from filing lawsuits against the CCR members in state or federal courts.

Scope of the Settlement. The proposed Settlement would resolve all present and future claims of individuals who were exposed to asbestos products produced by any of the 21 CCR defendants and who had not filed a lawsuit prior to the initiation of this action. The class is defined to include all persons who had been exposed to asbestos either occupationally *or* through exposure as a spouse or household member of such exposed persons, *and* all spouses and family members of such persons. Pet. App. 23a and n.3.

There is no dispute that the proposed Settlement encompasses hundreds of thousands of claims. Brief for Petitioners ("Pet.Br.") at 1. These claims arise in over fifty jurisdictions, based on different types of asbestos disease, against 21 different companies. The class members were "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." Pet. App. 41a.

Settlement Compensation Scheme. The Settlement does not simply establish a general recovery fund, leaving the liquidation of each claim within the control of each claimant, but creates an elaborate administrative scheme that dispenses compensation to claimants meeting certain rigid exposure and medical criteria. Compensation is only provided for each of four categories of disease: mesothelioma,[6] lung cancer,

appealing the district court's fairness finding has not even begun to run, such implications are groundless, especially since even petitioners admit that "[e]very aspect of the proposed settlement was sharply contested by the objectors" at the district court level. *Id.* at 9.

[6] Mesothelioma is a fatal cancer of the lining around the lung and/or abdomen that results from exposure to asbestos. Although only a small fraction of those exposed to asbestos will contract mesothelioma, its victims generally die within two years of diagnosis. Pet. App. 56a, JA

certain other cancers (including colo-rectal, laryngeal, esophageal, and stomach cancer), and non-malignant conditions (asbestosis and bilateral pleural thickening). For those claimants who qualify under the specified medical criteria, the Settlement "fixes a range of damages that CCR will award for each disease, and places caps both on the amount that a particular victim may recover and on the number of qualifying claims that will be paid in any given year." Pet. App. 25a. The exact damage amount that will be awarded to each claimant is determined by CCR, with virtually no right of appeal.[7] *Ibid.*

335. Unlike other asbestos diseases (such as lung cancer), the only medically established cause of mesothelioma is asbestos exposure. *Ibid.*

Mesothelioma can be caused by only slight or incidental exposure to asbestos fibers. The disease has been known to occur in children who lived with an asbestos-exposed parent or worker. Pet. App. 56a. "[T]he unpredictability of mesothelioma is further exacerbated by the long latency period between exposure to asbestos and the onset of the disease, typically between fifteen to forty years." *Ibid*; *see also* JA 335.

[7] There are only two extremely limited scenarios under which a claimant may receive an amount in excess of the damage ranges. First, for a restricted number of "Extraordinary" claims (between one and three percent of the total number of qualified claims in the four disease categories), CCR may award an amount in excess of the range, although the total amount that may be paid for such claims is itself capped. Pet. App. 25a.

Second, a small number of claimants who qualify for payment under the Settlement, but are dissatisfied with the damage amount offered by CCR, may pursue their claims in court. *Ibid.* However, the number of claimants who may pursue this "back-end opt-out" is very low. Between one-half of one percent and two percent of the total number of claims in each disease category from the previous year may exit to the tort system. *Ibid.* For example, only 700 mesothelioma claims can be resolved in the first year of the Settlement, and only 2%—14 victims—may seek an exit to their local court system. JA 108, JA 174. By the Settlement's tenth year, these figures drop to a maximum of 455 mesothelioma cases annually with only nine (9) exit permits. *Ibid.* Moreover, if the number of people who seek to re-enter the tort system in a particular year exceeds the annual quota, the surplus applicants have to wait one or more years for one of the few allocated spaces. Predictably, after less than two years, there is already a backlog of claimants waiting for exit visas. *See* Mem-

Although CCR makes no claim of potential insolvency for even one of its members, the Settlement fixes damages at amounts which are only a small fraction of the damages typically awarded in the tort system. For example, those "unlucky" few who contract mesothelioma are "relegate[d] . . . to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into millions of dollars." Pet. App. 49a; *see also* JA 351-52. The "negotiated average value" under the Settlement for mesothelioma claims ranges from $37,000 to $60,000. JA 110. According to an analysis that CCR conducted of their pre-class action settlement history, for all high value mesothelioma claims, their own national average was $359,715. JA 461. Fifteen percent of high value claims were from California and the California average was $419,674. The California state *average* is more than double the maximum allowable recovery for Non-Extraordinary Claims ($200,000), *ibid*, and 40% higher than the Extraordinary Claim cap ($300,000).[8] *See* JA 85, 110, 461. Moreover, the Settlement provides *no* cash compensation to pleural claims "even though such claims regularly receive substantial monetary payments in the tort system." Pet. App. 26a.

The class members are bound to the Settlement in perpetuity. In contrast, the CCR companies may choose to withdraw after ten years.[9] Pet. App. 25a-26a.

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orandum in Support of Additional Class Counsel's Motion to Alter FIFO Ordering For Mesothelioma Claims Under Part X at 3 (filed with district court on October 25, 1996). Given the short life expectancy of mesothelioma victims, most will likely die before they can exit the Settlement system.

[8] The number of Extraordinary Claims is limited to a maximum of 21 per year in the first two years and declining thereafter. JA 85, 109.

[9] Moreover, for the first ten years, the Settlement provides no adjustment of the compensation levels, even to account for inflation. Pet. App. 141a. After ten years, the values in the compensation schedule may be subject to a one-time adjustment, but by no more than 20%. Pet. App. 138a.

2. THE DISTRICT COURT'S CLASS CERTIFICATION DECISION

In the district court, the Settling Parties took the position that so long as the settlement itself is found to be fair under Rule 23(e), the settlement class would satisfy the certification requirements of Rule 23. *See, e.g.*, JA 41. They unambiguously argued that the "standards for determining whether a class should be certified are considerably *more lenient* when certification is sought for purposes of settlement, rather than for purposes of litigation." JA 39 (emphasis added).

The district court adopted the Settling Parties' position. The decisions regarding fairness and class certification were made simultaneously. The district court certified the class, after only a perfunctory review of Rule 23 certification requirements. It held that the Rule 23 requirements for class certification "are often more readily satisfied in the settlement context because the issues for resolution by the court are more limited than in the litigation context." Pet. App. 224a (citations omitted).

Thus, with respect to the Rule 23(b)(3) requirement that class issues predominate, the district court specifically held that this requirement is "more readily satisfied in the settlement context than in the litigation context." Pet. App. 226a (citations omitted). The court concluded that there was predominance:

> The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. *Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the*

claims of the class is a predominant issue for purposes of Rule 23(b)(3).[10]

Ibid. (emphasis added)

With respect to the mandatory notice and opt-out requirement for Rule 23(b)(3) actions, the district court held that notice was adequate because "over 6.8 million persons, including individuals who were likely class members, received individually-delivered notice materials, and that millions more persons, including likely class members, were notified through media efforts." Pet. App. 267a. The district court ignored substantial evidence that it is impossible to provide adequate notice to individuals who, at some date in the future, will contract asbestos-related conditions such as mesothelioma. Moreover, those individuals who actually received notice were forced, in 1993, to make a final, irrevocable decision about opting-out of the class, despite the overwhelming dearth of information that they had regarding their future medical condition or what recovery, if any, the Settlement would provide. *See* discussion, *infra*, Section II.B.2.

The district court did not consider, or make any factual findings, regarding the substantial evidence that recoveries for asbestos victims varied greatly from state to state. *See* JA 351-52, 464-68, 562, 572-78.[11] While the district court

[10] With respect to the superiority prong of Rule 23(b)(3), the district court again relied upon the fairness and adequacy of the proposed settlement, concluding that because the settlement "provided class members with fair compensation for their claims while reducing the delays and transaction costs endemic to the asbestos litigation process as it occurs presently," it was "superior to other available methods for the fair and efficient resolution" of these claims. Pet. App. 228a. The district court's opinion does not reflect consideration of whether an individual's interest in controlling his or her own legal action, particularly the extremely valuable mesothelioma claims, might outweigh the efficiency afforded by a classwide settlement.

[11] Average mesothelioma settlements against the CCR defendants ranged from a low of $11,638(Maine) to a high of $198,041(South Dakota). For lung cancer, the low was $1,500 (Nebraska) to a high of $122,866 (District of Columbia). JA 572-78. California mesothelioma verdicts were 53% higher than the national average. JA 351-52.

described at length the perceived procedural advantages of the Settlement, it ignored the marked differences in the substantive and procedural rights of asbestos plaintiffs in different states.[12] For example, most of the procedural benefits provided by the Settlement are already available for California claimants, who enjoy unique procedural advantages under state law.[13] In a single footnote, the court summarily dismissed the evidence of interstate differences. Pet. App. 248-249 n.64.

3. THE THIRD CIRCUIT'S OPINION

The ostensibly governing legal standard articulated by the Third Circuit required that for the purpose of certifying a settlement class, each of the requirements of Rule 23 "must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. However, despite its own pronouncement, in fact it took the Settle-

[12] The objectors sought discovery from the Settling Parties concerning their consideration of inter-state differences with respect to the legal standards governing asbestos cases and the average amount of damages awarded to plaintiffs, on a state by state basis. This evidence was highly relevant to analyzing the terms of the Settlement, particularly with respect to inter-state conflicts among class members. All such discovery was disallowed on grounds of relevance. JA 327.

[13] For example, one of the purportedly key benefits of the Settlement to many claimants is that CCR agrees to waive all statutes of limitations. JA 75. For California claimants, this provision is of little value because such protection is already available under California Code of Civil Procedure Section 340.2, which provides a generous statute of limitations for claims for injury or illness based upon exposure to asbestos. Cal. Code Civ. Pro. § 340.2. Similarly, California provides calendar preference for fatally ill plaintiffs, which permits recovery at least as quickly as the Settlement. Cal. Code Civ. Pro. § 36(d); *see also* JA 351. For further discussion, *see* Written Objections of John Musante, filed with District Court on February 10, 1994, Docket No. 739, at 6-15.

ment into account in some respects in reviewing the district court's evaluation of certification. While the legal standard articulated by the Third Circuit is overbroad and unrealistic, the decision below should be affirmed because the court found that the Rule 23(b)(3) requirement of predominance and the Rule 23(c)(2) notice and opt-out requirements were not satisfied.[14]

Predominance of Common Issues. The Third Circuit acknowledged that a number of common issues existed[15] sufficient, perhaps, for a Rule 23(a)(2) showing of commonality, and instead focused its commonality analysis on the (b)(3) requirement that common questions predominate over individual issues. Pet. App. 43a. Under this demanding (b)(3) standard, the court determined that "the huge number of important individualized issues," overwhelmed the common and largely settled issue of the capacity of asbestos fibers to cause physical injury. Pet. App. 40a, 43a, 48a. The court noted the broad range of individual issues:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

[14] Examining the terms of the Settlement, the court also concluded that the Rule 23(a) requirements of typicality and adequacy of representation were not met. Pet. App. 49a, 53a.

[15] The Third Circuit noted that exposure to asbestos and the capacity of asbestos fibers to cause physical injury are common questions under Rule 23(a)(2). Pet. App. 40a. The court also recognized that "there may be several other common questions, such as whether the defendants had knowledge of the hazards of asbestos, whether the defendants adequately tested their asbestos products, and whether the warnings accompanying their products were adequate." *Ibid.*

> The futures plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.

Pet. App. 41a. With respect to the vast state-by-state differences in legal standards, the court observed that because "we must apply an individualized choice of law analysis to each plaintiff's claims, . . . the proliferation of disparate factual and legal issues is compounded exponentially."[16] *Ibid.*

Superiority. Rule 23(b)(3)'s requirement that the action be "superior to other available methods" requires the court "to balance, in terms of fairness and efficiency, the merits of a class action against those of 'alternative available methods' of adjudication." Pet. App. 54a (citation omitted). The court concluded that superiority had not been established.

In terms of efficiency, the court, ignoring the Settlement, held that "a class of this magnitude and complexity could not be tried." Pet. App. 54a. With respect to the fairness prong of the superiority inquiry, the court determined: (a) that the superiority requirement would not be met if the class were "[c]onsidered as a litigation class," and (b) that superiority was lacking *even if the settlement were considered*, because, "in this class action," plaintiffs "have a substantial stake in making individual decisions on whether or when to settle" yet "may become bound to the settlement even if they are unaware" of the settlement "or lack sufficient information to evaluate it." Pet. App. 55a (emphasis added). The court

[16] The court contrasted the lack of common issues in this case with more limited certifications that involve injunctive relief, Pet. App. 42a, property damage actions, *ibid*, cases where there was a central single issue such as one basic defense, Pet. App. 45a, or cases involving only partial certification of common issues, Pet. App. 47a.

emphasized that these problems could have been alleviated if the Settlement provided for "an opt-in rather than opt-out procedure, or allowed plaintiffs to opt-out after they contract a disease." Pet. App. 56a n.16.

Notice. Finally, the court noted that Rule 23(b)(3) fairness concerns were exacerbated by "the difficulties in providing adequate notice" to "exposure-only plaintiffs [who] may eventually contract a fatal disease, mesothelioma, from only incidental exposure to asbestos." Pet. App. 56a. Given the long latency period between exposure to asbestos and the onset of the disease,

> persons contracting the disease today may have little or no knowledge or memory of being exposed. It is unrealistic to expect every individual with incidental exposure to asbestos to realize that he or she could someday contract a deadly disease and make a reasoned decision about whether to stay in this class action.

Ibid.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners focus their entire attack on the broad, abstract holding of the Third Circuit that the existence of a settlement may not be considered in determining certification of a settlement class. In fact, the Third Circuit ultimately did examine the Settlement in determining the appropriateness of certification. Its thorough and thoughtful analysis is carefully tailored to the specific requirements and purposes of Rule 23(b)(3) class cases.

The district court, on the other hand, adopted an extreme approach to class certification not embraced by any circuit court: that the settlement itself, and the settlement approval process, may substitute for the predominance of common questions required by Rule 23(b)(3).

Petitioners offer this Court a stark and unnecessary choice between the unqualified holding of the Third Circuit—that class certification must be assessed without considering the settlement—and their own equally broad-brush approach that would essentially allow the settlement and its asserted fairness to establish compliance with Rule 23(b)(3).

We agree that the settlement and its fairness should not be ignored in assessing class certification; we also concur that the court need not "pretend" that all aspects of the case will be tried. And we agree, *arguendo*, that the existence of a fair settlement may well be relevant to a Rule 23(b)(3) showing that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.Pro. 23(b)(3).

On the other hand, in Rule 23(b)(3) class actions, a fair settlement is no substitute for a showing that common issues predominate. The predominance requirement stems from the special nature of damage actions, where individual control of an action is a substantial interest, and class treatment is discretionary. Because such actions are by nature less cohesive than Rule 23(b)(1) or (b)(2) actions, and the need for unitary resolution is not essential, predominance is the core requirement, which determines if a Rule 23(b)(3) class exists. Predominance ensures that there is sufficient cohesiveness among class members such that collective action, which will have a binding effect on all class members, may substitute for the presumption in favor of individual litigation of personal injury damage claims. Nothing in Rule 23 or the case law supports the district court's conclusion that the settlement alone can establish the Rule 23(b)(3) requirement that class issues predominate. Indeed, no circuit court has so held. Petitioners' approach ultimately eviscerates the predominance requirement entirely. If a settlement will always satisfy the Rule 23(b)(3) predominance requirement, Rule 23(b)(3) settlements classes will automatically be certified.

A proper application of Rule 23(b)(3) balances the interests of efficiency against the rights of absent class members. Recognizing this important balance, the Third Circuit correctly concluded that the Settlement class did not meet the Rule 23(b)(3) predominance requirement and, moreover, properly underscored the failure of the Settlement to afford meaningful notice and opt-out rights to future claimants who have no idea if, or when, they may fall victim to one or more asbestos-related diseases. To conclude otherwise would allow parties to sacrifice the bedrock requirement of class cohesiveness and the opportunity to opt-out of the class upon the altar of expediency. It would allow any parties, so long as represented by competent counsel, to impose a settlement upon enormous numbers of putative class members without regard for their interests or desires. Res judicata should not be the reward for the achievement of judicial efficiency at any cost.

ARGUMENT

I. THE THIRD CIRCUIT'S APPROACH, WHILE OVERBROAD, CORRECTLY FOCUSED THE ANALYSIS OF CLASS CERTIFICATION ON THE UNIQUE REQUIREMENTS OF RULE 23(b)(3)

The Third Circuit articulated a legal standard that was plainly too broad and inflexible. In holding that settlement must be ignored for *all* elements of the certification inquiry, the court enunciated a principle that was not only inconsistent with what a number of other circuits have held, but was one which *it did not itself apply*. Contrary to its own maxim, the Third Circuit's actual analysis of the Settlement weighed the Settlement itself in evaluating a number of the Rule 23 certification requirements.[17] As such, resolution of petitioners'

[17] The Third Circuit considered the Settlement in analyzing the adequacy of representation and typicality requirements under Rule 23(a) and the superiority requirement under Rule 23(b)(3). Thus, even if petitioners' position were adopted, the Third Circuit would reach the same result.

complaint about the Third Circuit's broad statement of the theoretical standard will have little impact on the resolution of this—or any other—class action settlement.

If one sets aside the Third Circuit's unqualified statement of its legal standard, its actual analysis was, for the most part, a textbook example of the careful scrutiny that must be applied to class certification in the settlement context.[18] Most importantly, the Third Circuit scrupulously focused on the unique purposes and prerequisites for Section (b)(3) class treatment and expressly limited its commonality holding on that basis. Pet. App. 19a. Section (b)(3) actions—where class treatment may be desirable but not necessary to achieve a just result—were intended for use only where the putative class demonstrates sufficient cohesion and the right of class members to retain individual control of their claims is preserved. Recognizing the careful balancing of interests which underlie Rule 23(b)(3), the Third Circuit was *correct* in requiring that the predominance requirement be satisfied independent of the existence of the settlement.

A. The History and Purposes of Rule 23(b)(3)

Section 23(b)(3) was added to Rule 23 in 1966 as part of a comprehensive revision of the class action rule by the Advi-

[18] This Court has repeatedly held that the requirements of Rule 23 are mandatory. *See, e.g., General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982); *East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (rejecting suggestion that the mandatory notice requirement for Rule 23(b)(3) actions should be excused because of its expense or because there had been adequate representation); *Richards v. Jefferson County*, 116 S.Ct. 1761, 1766-67 (1996)(adequate representation does not cure a lack of notice). *See also Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 (D.C. Cir. 1986) (no basis for applying Rule 23 less stringently in Magnuson-Moss action), *cert. denied*, 482 U.S. 915 (1987). "Actual, not presumed, conformance" with Rule 23 is "indispensable." *Falcon*, 457 U.S. at 160. We focus, here, solely on Rule 23(b)(3) predominance and notice requirements—the narrowest grounds consistent with the Issue Presented—because the Third Circuit's approach to these issues conforms to the purposes underlying Rule 23(b)(3).

sory Committee on Civil Rules. The Committee chose to jettison the existing rule's cumbersome and obscure classification system (i.e., true, hybrid, spurious) in favor of "more practical" descriptions of the circumstances in which class actions could be maintained as well as "the measures . . . to assure the fair conduct of these actions." *Amendments to Rules of Civil Procedure, Rules Advisory Committee Notes to Amended Rule 23*, 39 F.R.D. 69, 99 (1966). The new subdivision (b) of Rule 23 described the "varying situations" in which the Committee believed the use of class actions could be justified. *Id.* at 100.

Rule 23(b)(1) was intended to address those circumstances where "an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit." *Id.* at 101. This subdivision encompasses, for example, the disposition of a traditional "limited fund." Where a fund exists which is too small to satisfy all claims against it, unitary class disposition is necessary to "effect a pro-rata reduction of all claims in order to treat all claimants fairly." *In Re Asbestos Litigation*, 90 F.3d 963, 986 (5th Cir. 1996). In such actions, "equitable circumstances dictate the need for unitary adjudication regardless of the individual consent of the parties affected." Herbert Newberg and Alba Conte, 1 *Newberg on Class Actions* § 1.22 at 1-51 (3d ed. 1992). In the classic (b)(1) limited fund context, a failure to grant class relief may result in many class members receiving a severely diminished recovery or no recovery at all.

Rule 23(b)(2) was intended for equitable actions seeking primarily injunctive or declaratory relief against a party which "has acted or refused to act on grounds generally applicable to the class." Fed.R.Civ.Pro. 23(b)(2). Like Rule 23(b)(1) actions, adjudication of the rights of one class member will necessarily determine the rights of others.

Thus, in both Rule 23(b)(1) and (b)(2) actions, class treatment "arises out of the necessity to protect all interested persons and to give full relief when numerosity precludes joinder." James Wm. Moore, 3B *Moore's Federal Practice*, ¶ 23.45[2] at 23-298 (2d ed. 1987). In such cases, a failure to grant class relief is often tantamount to a denial of all relief for class members.

The third, and most controversial, subdivision of the 1966 amendment was the creation of the Rule 23(b)(3) opt-out class action. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356, (1967); Judith Resnik, *From Cases to Litigation*, 54 Law and Contemporary Problems 5, 9 (Summer 1991). While the historical roots of Rule 23(b)(1) and 23(b)(2)-type class actions can be traced to traditional equitable class action procedure recognized at English common law, the Rule 23(b)(3) opt-out class action device was an invention of the 1966 Advisory Committee.[19] *In Re Asbestos Litigation*, 90 F.3d at 987 n.16.

The Advisory Committee envisioned that Rule 23(b)(3) would be used in situations "where class-action treatment is not as clearly called for" as it was in the Rule 23(b)(1) and Rule 23(b)(2) situations, but might "nevertheless be convenient and desirable." Advisory Committee Notes, 39 F.R.D. at 102-03.

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, *without sacrificing procedural fairness or bringing about other undesirable results.*

Ibid (emphasis added).

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[19] The only historical antecedent to Rule 23(b)(3) was the "spurious" opt-in action of the 1938 version of Rule 23 which was a permissive joinder device rather than a true class action. *See* Advisory Committee Notes, 39 F.R.D. at 98-99.

At the heart of the debate was a concern that, in circumstances where unitary resolution is *not* essential (as it is in the Rule 23(b)(1) and (b)(2) situations), the rule should account for each individual's interest in retaining the right to control his or her own claim. Where, for example, the amount of an individual's potential stake is small, and thus the individual's need to exercise direct control of the lawsuit is minimal, discretionary use of class treatment under Rule 23(b)(3) might well be desirable and would achieve "economies of time, effort and expense." Advisory Committee Notes, 39 F.R.D. at 102. On the other hand, "where the stake of each member bulks large and his will and ability to take care of himself are strong," class treatment might not be appropriate. Kaplan, *Continuing Work*, at 391. The Committee recognized that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action." Advisory Committee Notes, 39 F.R.D. at 104.[20]

To accommodate this compelling interest in individual control over claims, the Committee erected three independent hurdles to be met for Rule 23(b)(3) discretionary class treatment, *in addition to* the requirements of numerosity, typicality, commonality and adequacy of representation found in Rule 23(a). These requirements are that: 1) common issues predominate, 2) class resolution will be superior to alternative methods of adjudication; and 3) class members receive notice

[20] Indeed, the Advisory Committee's concern for individual control of traditional damage claims is reflected in its opinion that "a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a [Rule 23(b)(3)] class action." Advisory Committee Notes, 39 F.R.D at 103. The drafters viewed tort actions as "quintessentially cases involving individuals" and this vision reflects, among other things, a concern "for plaintiffs whose autonomy, individuality and control could be limited." Resnik, *Cases to Litigation*, at 17. While the case law regarding the class treatment of mass torts has obviously evolved since 1966, the Advisory Committee's concern reflects the significance that was placed on individual control in determining the propriety of certifying a Rule 23(b)(3) discretionary class action. Resnik, *Cases to Litigation*, at 17-19.

and a right to opt-out of the class. These additional hurdles take into account the fact that Rule 23(b)(3) classes are by nature less cohesive than (b)(1) or (b)(2) classes, and thus require more stringent protections for absent class members. *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983).

B. Analysis of Rule 23(b)(3) Requirements for Settlement Classes

Rule 23(b)(3) ultimately requires a balance between the strong interest in individual control of an action and the interests of efficiency and fairness. For the predominance and opt-out requirements, the concern with individual control is paramount, and thus the the fact of settlement is not relevant to the analysis. The superiority requirement, on the other hand, permits considerations of the fairness and efficiency of a settlement.

1. Predominance of Common Issues

a. Predominance Establishes the Threshold Existence of a Cohesive Class

The first hurdle imposed by Rule 23(b)(3) is that "questions of law and fact predominate over any questions affecting only individual class members." The predominance finding ensures that there is a sufficient cohesiveness of common interests to justify class treatment. Unlike the Rule 23(a) commonality requirement which may be satisfied by one common issue of law or fact,[21] Rule 23(b)(3) requires:

[21] Because the threshold for demonstrating the Rule 23(a) commonality requirement is quite low, it will rarely be an impediment to certification of a settlement class. *Jenkins v. Raymark*, 782 F.2d 468, 472 (5th Cir.) *reh'g denied en banc* (5th Cir. 1986); Pet. App. 42a. Indeed, the Third Circuit in this case had no trouble identifying sufficient common issues to satisfy this requirement without considering the settlement. Pet. App. 40a, 43a. In a Rule 23(b)(1) or (b)(2) class action settlement, commonality under 23(a) will normally be easily established without reliance on the settlement, because the additional requirements of sections (b)(1)

> common questions [must] not only exist but "predominate" over questions touching only individual members of the class. For a class action loses attractiveness as the individual questions are seen to have such scope or variety as to overload the action.

Kaplan, *Continuing Work*, at 390.

Predominance requires that there be a group which is "more bound together by a mutual interest in the settlement of common questions than it is divided by the individual members' interest in the matters peculiar to them." 3B *Moore's Federal Practice*, ¶23.45[2] at 23-299. The predominance requirement is not simply a tool to ensure administrative efficiency, "it is a necessary feature in the demonstration of the existence of an actual class." *Id.* ¶23.45[2] at 23-299 n.5. Without predominance, there is no class.

The unique predominance requirement of Rule 23(b)(3)—but not of Rule 23(b)(1) or (b)(2)—flows, in part, from the historic change from the "opt-in" provision of the old "spurious" class action to the new "bound if no opt-out" rule. With the revised opt-out approach, it was recognized that, even with an opt-out right, members of the class could be bound to the class judgment as a result of inaction rather than personal choice. Marvin Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44-45 (1967). To avoid "potentially capricious" results, a more stringent showing of cohesion was required as an extra safeguard. 3B *Moore's Federal Practice*, ¶23.45[2] at 23-300.

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and (b)(2) virtually always demonstrate commonality. 1 *Newberg on Class Actions*, § 3.10 at 3-56. Thus, for example, in a Rule 23(b)(1)(B) case, the risk of diminished recovery by all members of the class, in the absence of class treatment, is a common issue of fact. See *In re Asbestos Litigation*, 90 F.3d at 975-76.

b. Predominance Should be Evaluated Without Consideration of the Settlement

Because predominance serves as a safeguard to ensure that discretionary class treatment under Rule 23(b)(3) is appropriately invoked, the Third Circuit correctly evaluated this requirement without reliance on the Settlement. The threshold inquiry for Rule 23(b)(3) is: do the claims (and defenses thereto) of a disparate collection of individuals share enough common features to establish an interest in a unitary resolution despite individual interests? Unless this finding can affirmatively be made, then the parties are not entitled to use Rule 23(b)(3); instead, the presumption in favor of individual control of claims will prevail. If a settlement were allowed to establish predominance, it would defeat the Rule 23(b)(3) recognition of the desirability of individual control and, more importantly, would beg the essential threshold question of whether there is sufficient class cohesiveness.

Petitioners attempt to justify the district court's approach to class certification on the grounds that it is based on a "judicial consensus" that "the existence of a settlement should be taken into account in applying the Rule 23 criteria." Pet.Br. at 22-23 and accompanying footnotes. Although there is broad consensus that settlement classes are permissible,[22] and there may be a consensus that settlement may be taken into account in some fashion in making the certification decision, there is *no* authority for the proposition that a settlement may substitute for establishing the existence of a class. Most significantly for our purposes, of the appellate court cases cited by petitioners, *none has held that a settlement establishes the Rule 23(b)(3) requirement of predominance.*[23]

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[22] The Third Circuit is part of this consensus. *See* Pet. App. 36a; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799-800 (3d Cir.) *cert. denied*, 116 S.Ct. 88 (1995).

[23] There are but three district court cases that hold that a settlement is relevant to the predominance requirement, yet none of these cases con-

Petitioners also argue that a proposed settlement eliminates all uncommon or "disparate" issues, leaving the remaining issue of only whether the settlement is fair to the class. Pet.Br. at 42. But a settlement proposal does not erase the differing claims and interests of class members, including their interest in controlling their own claims. Rather, a Rule 23(b)(3) settlement *presumes* that the underlying claims share sufficient unity to justify class treatment. Only if that presumption is, in fact, correct do the putative class representatives and class counsel have the authority to compromise those claims. Petitioners' approach would essentially bootstrap the class determination from the fact that a settlement has been offered. Such an approach would invariably eliminate the predominance requirement in all settlements. While that may be "efficient," it is not the purpose of the Rule 23(b)(3) predominance requirement.[24]

tain any analysis whatsoever. *Woodward v. Nor-Am*, No. 94-0780-CB-C, 1996 U.S. Dist. LEXIS 7372, at *42 (S.D. Ala. May 23, 1996); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 160 (S.D. Ohio 1992); *In re First Comodity Corp. Customers Accounts Litig.*, 119 F.R.D. 301, 307 (D. Mass. 1987).

[24] Petitioners' repeated reliance on the goal of "efficiency" is particularly inappropriate for cases such as this, where certification is sought under Rule 23(b)(3). To be sure, the predominance requirement also ensures that class litigation will be an efficient use of judicial resources. Since arguably any class action may be more efficient than numerous individual actions, however, the requirement is not met merely by an assertion that a class action will be efficient. In order to certify a Rule 23(b)(3) class, the rule mandates careful evaluation of each class member's due process rights and interest in controlling his or her own litigation. Fed.R.Civ.P. 23(b)(3). While efficiency is one factor to be balanced in the (b)(3) superiority inquiry, it does not substitute for a showing of either predominance of class issues or a meaningful notice and opt-out right.

Nor does Rule 1 of the Federal Rules of Civil Procedure, which provides that the rules must be construed to secure the "*just*, speedy, and inexpensive determination of every action," Fed.R.Civ.Pro. 1 (emphasis added), suggest that efficiency should override Rule 23 prerequisites. Rule 1 focuses upon the need for *both* efficiency and justice. An interpretation of Rule 1 which sacrifices fairness on the altar of efficiency is

Moreover, the claim that petitioners have "obligated themselves to compensate [qualifying] class members" and have "waived all defenses" under the terms of the Settlement does not change the analysis.[25] Pet.Br. at 42. If anything, it underscores the need for rigorous and independent analysis of Rule 23(b)(3) predominance. The procedural and substantive rights provided by state law to asbestos victims vary widely among the states. For asbestos victims considering whether to litigate or settle, the rights unique to their individual states, along with the likely recovery for claims that flow from those differing rights, will be determining factors. The Settlement does not "waive" such differences—it obliterates them and imposes a one-size-fits-all standard on the class.[26] Perhaps such a national standard might be justified if class resolution were necessary (for example in a limited fund Rule 23(b)(1)(B)

completely contrary to both the language and spirit of the federal rules. *See* 3B *Moore's Federal Practice* ¶23.45[3] at 23-313 n.5 ("the administration of justice is not an end in itself. It is only a means to get justice.")

[25] Petitioners' justification of the district court's analysis, based on the so-called "background presumptions" underlying the federal rules, also fails. Pet.Br. at 31-33. They imply that the parties may *waive* Rule 23. This argument presupposes the very issue that the district court must address—whether there is in fact a class cognizable under Rule 23(b). Only if there is a class would the representative have the authority to make agreements, or waive claims on behalf of the class. If the requirements of Rule 23(b) are not met, then the parties do not have the authority to impose their agreement upon the class.

[26] The Settlement sets forth a non-exhaustive list of over eighteen factors which CCR may consider in setting compensation for claimants within its specified damage ranges. While the "location of the forum in which a lawsuit" might otherwise be filed by a claimant is included on that long list, the Settlement provides no formula or system for weighing this or any other factor. Indeed, there is utterly no guidance about how these factors should be evaluated or compared. JA 80. Instead, victims are left to the unfettered discretion of the CCR defendants they can no longer sue. Such discretionary and standardless determinations cannot substitute for an assessment of whether state-by-state differences are material enough to compel a finding against predominance.

action) or where state law differences were not significant However, in a Rule 23(b)(3) action, such differences, in fact, may expose the essential lack of cohesion of the class, and the lack of predominance of common issues. *See Castano v. American Tobacco Co.* 84 F.3d 734, 741 (5th Cir. 1996); *Walsh v. Ford Motor Co.* 807 F.2d at 1016-17.

c. A Finding of a Settlement's Fairness under Rule 23(e) Cannot Substitute for Independent Evaluation of Rule 23(b)(3) Predominance

While the terms of a settlement and its approval process may undoubtedly provide evidence relevant to a number of the Rule 23 requisites, the Rule 23(e) settlement inquiry—which serves distinct purposes—does not address the same purposes that underlie the predominance requirement.

Rule 23(e) prohibits the dismissal of a class action "without approval of the court." This has uniformly been interpreted to mean that the district court must determine that the proposed settlement is "fair, adequate and reasonable." *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975). This inquiry will focus on the terms of the settlement itself and its fairness to the class *overall*. As the Second Circuit explained in *Weinberger v. Kendrick*, 698 F.2d 61, 73-74 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983):

> Determination [of] whether a proposed class action settlement is fair, reasonable and adequate involves consideration of two types of evidence. The primary concern is with the substantive terms of the settlement: 'Basic to this . . . is the need to compare the terms of the compromise with the likely rewards of litigation.' [citations omitted] * * * In order to supplement the thus necessarily limited examination of the settlement's substantive terms, attention also has been paid to the negotiating process by which the settlement was reached, and courts have demanded that the compromise be the result of

> arm's length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in discovery, necessary to effective representation of the class's interests. [citations omitted]

See also Moore v. San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980) (the sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just); *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.) (the most important factor in assessing fairness is the strength of the case on the merits balanced against the amount offered as settlement), *cert. denied*, 423 U.S. 864 (1975). Thus, the court is concerned with the *substance* of the agreement and the process by which the agreement was reached. Moreover, as the district court in this case noted, the focus in a fairness inquiry is whether the proposed settlement "evaluated as a whole, and not term-by-term or plaintiff-by-plaintiff" is fundamentally fair. Pet. App. 237a. Thus, nothing in Rule 23(e) is intended to safeguard the substantive or procedural rights of individual class members.

In contrast, Rule 23(b)(3) focuses on the cohesiveness of the class and a proper regard for individual control of an action. Additionally, while the fairness process examines the substantive fairness of a settlement, Rule 23(b)(3) is concerned with the due process rights of the class. *In re General Motors Corp. Pick-Up Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, 116 S.Ct. 88 (1995).

d. Requiring that Predominance Exist Independent of any Proposed Settlement Will Not Hamper Class Resolution of Complex Cases

Contrary to petitioners' dire predictions, the requirement that predominance be established without reliance on the settlement will not impede settlement of civil rights, antitrust, and securities actions, or even appropriate mass tort cases. Pet.Br. at 35-37.

First, because *predominance* is only a requirement for cases certified under Rule 23(b)(3), many types of class actions are unaffected. Many civil rights cases, for example, are certified under Rule 23(b)(2).[27] Similarly, in many mass tort cases, recovery is subject to a limited fund, requiring certification under Rule 23(b)(1).[28] While some overreaching settlements in mass tort cases may be precluded under Rule 23(b)(3) if a court cannot rely on the proposed settlement to get over the predominance hurdle, this result is necessary to preserve the core values of Rule 23(b)(3): class cohesion and individual control of damage actions.

Second, outside of the field of mass torts, petitioners have not demonstrated that the predominance requirement would be a major impediment to class settlements. Indeed, even in securities actions, class certification is relatively routine in the litigated context. *See* Thomas E. Willging, Laural L. Hooper and Robert J. Niemac, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 NYU Law Rev. 74, 89 (April-May 1996). Moreover, in contrast to complex personal injury mass tort actions, civil rights, antitrust, securities and fraud cases present substantially fewer individualized claims than those in mass tort cases. Statutory actions, such as civil rights, antitrust or securities cases, present no choice of law or inter-state differences because they are based upon a single body of law. Furthermore, courts have already developed a variety of procedural devices to streamline any potentially individualized determinations in such actions. *See, e.g., Cooper v. Federal Reserve Bank*, 467 U.S. 867, 878-81

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[27] Indeed, the Rules Advisory Committee describes civil rights cases as the prototypes of (b)(2) class actions. Advisory Committee Notes, 39 F.R.D. at 102. *See, e.g., Officers for Justice v. Civil Service Comm'n.*, 688 F.2d 615, 622 (9th Cir. 1982) (certified as Rule 23(b)(2) for purposes of injunctive, declaratory and back pay relief), *cert. denied*, 459 U.S. 1217 (1983).

[28] *See, e.g., In re Asbestos Litigation*, 90 F.3d at 974; *In re A.H. Robins*, 880 F.2d 709, 742 (4th Cir.), *cert. denied sub nom., Anderson v. Aetna Casualty & Surety Co.*, 493 U.S. 959 (1989).

(1984) (classwide allegation of pattern and practice of discrimination decided separately from individual claims); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 359-62 (1977) (liability and damages bifurcated with burden shifted to defendant at damage phase); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974) (approving formulaic determination of classwide backpay award in civil rights case), *cert. denied*, 439 U.S. 1115 (1978); *In re Independent Gasoline Antitrust Litig.*, 79 F.R.D. 552, 561-62 (D. Md. 1978) (approving formulaic determination of classwide damages in antitrust case); *In re United States Financial Sec. Litig.*, 69 F.R.D. 24, 47-48 (S.D. Cal. 1975) (approving formulaic determination of classwide damages in securities case). Thus, a requirement that predominance be assessed without regard to settlement is unlikely to hamper settlement of such cases.

2. Superiority

The second, independent hurdle of Rule 23(b)(3) is the requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.Pro. 23(b)(3). "That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages." Advisory Committee Notes, 39 F.R.D. at 103.

The Rule provides that the "superiority" determination include consideration of two factors which directly address concerns for individual control and autonomy: "the interest of members of the class in individually controlling the prosecution or defense of separate actions" and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed.R.Civ.Pro. 23(b)(3). "The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they

see fit." Advisory Committee Notes, 39 F.R.D. at 104. These factors are *balanced*, under the rule, against considerations of "manageability" and "the extent of litigation. . .already commenced."[29] Fed.R.Civ.Pro. 23(b)(3).

In contrast to the predominance inquiry, the superiority requirement explicitly directs some consideration of the practical aspects of "managing" the case. It would serve, rather than hinder, the purposes of Rule 23(b)(3) to consider the Settlement in this calculation. The Third Circuit erred in ignoring the Settlement in determining manageability.[30]

3. Mandatory Notice and Opt-Out

Even where common issues predominate and class resolution is "superior," Rule 23(b)(3) incorporates yet another protection for the rights of individuals to control their claims: mandatory notice and a right to opt-out of the class. "[E]ven when the action is found by the court to lie within (b)(3), individual preference is still allowed to operate, and in a somewhat novel manner." Kaplan, *Continuing Work*, at 391. Subdivision (c)(2) requires that, in all (b)(3) actions, class members receive notice and the right to exclusion from the class.

> [T]he interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.

Advisory Committee Notes, 39 F.R.D. at 104-05. Moreover, the right to notice and opt-out in a Rule 23(b)(3) action is *mandatory*. *Eisen*, 417 U.S. at 176 (rejecting suggestion that the mandatory notice requirement for Rule 23(b)(3) actions should be excused because of its expense).[31] *Walsh v. Ford Motor Co.*, 807 F.2d at 107-08.

The mandatory notice requirement for Rule 23(b)(3) actions "is designed to fulfill requirements of due process to which the class action procedure is of course subject." Advisory Committee Notes, 39 F.R.D. at 107 (citations omitted). In *Eisen*, this Court, in applying Rule 23(c)(2)'s notice requirement for (b)(3) actions, reaffirmed its earlier holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that notice must be *meaningful*:

> when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reason-

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29 Petitioners dismiss Rule 23(b)(3) predominance and superiority requirements as focused "largely on avoidance of inefficiencies." Pet.Br. at 30. Because Rule 23(b)(3) prescribes a careful balancing of individual control *and* judicial economy, petitioners' characterization of Rule 23(b)(3) as nothing more than a tool for achieving judicial efficiency and convenience tells only half of the story. While manageability is one of several factors to be considered in assessing superiority, a factor we agree can properly be considered in the settlement context, efficiency is not the *sine qua non* of Rule 23(b)(3) treatment.

30 However, as argued *infra*, Section II.B.2, the Third Circuit's overall finding that superiority was absent because of the inherent problems of notice to future asbestos victims was correct.

31 The Court in *Eisen* also rejected plaintiff's contention that adequate representation, rather than notice, was the "touchstone of due process" in a Rule 23(b)(3) class action.

> Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much, for it quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. We therefore conclude that Rule 23(c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.

Eisen, 417 U.S. at 176-77.

ableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.

Eisen, 417 U.S. at 174, *quoting Mullane*, 399 U.S. at 315. *See also Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 834 (3d Cir. 1973).

There is no justification for a relaxed or liberalized analysis of notice and opt-out rights in the context of a settlement. In *Eisen*, this Court expressly rejected arguments that the parties be allowed to dispense with notice in a Rule 23(b)(3) case in circumstances where notice was difficult, expensive or unjustified by the size of the class member's stake. *Eisen*, 417 U.S. at 176. Notice and opt-out are "unambiguous requirement[s] of Rule 23." *Ibid.* For all (b)(3) settlement classes, courts must ensure that meaningful individual notice and the right to exclusion are provided.[32] If this mandatory requirement is not met, the putative class may *not* be certified and the class settlement, whatever its benefits, must be rejected. In other words, *no cost-benefit calculus will justify inadequate notice and opt-out rights*.

Indeed, in contrast to notices for litigated classes, greater scrutiny of settlement class opt-out notices is necessary for at least two reasons. The *contents* of a settlement notice will often be substantially longer and more complex because it will describe the underlying litigation, the opt-out process, and the settlement provisions and procedures for objecting to the fairness of the settlement. Second, faced with a lengthy document that describes a complex settlement, a class member may feel as if he or she is being presented with a "fait accompli." *Mars Steel Corp. v. Continental Illinois Nat'l.*

[32] Notice and an opportunity for exclusion are not required for actions under Rule 23(b)(1) and (b)(2) because unitary resolution mandates the binding of all class members. *In re Asbestos Litigation*, 90 F.3d at 986-87. Class notice of a settlement will, however, be provided to class members to permit them to object to the settlement or, if appropriate, to file a claim. Fed.R.Civ.Pro. 23(e).

Bank & Trust Co., 834 F.2d 677, 680-681 (7th Cir. 1987); *GM Trucks*, 55 F.3d at 789.

II. THIS SETTLEMENT CLASS DOES NOT MEET THE RULE 23(b)(3) REQUIREMENTS OF PREDOMINANCE AND NOTICE

A. The Class Does Not Satisfy the Requirement that Common Issues Predominate

If the Settlement is not taken into account—as it should not be—the class clearly does not satisfy the Rule 23(b)(3) predominance requirement.

The district court identified only one common question of law or fact, apart from the class's interest in the fairness of the settlement: that "members of the class have all been exposed to asbestos products supplied by the defendants. . . ." Pet. App. 226a. The Third Circuit, while noting that this was probably sufficient to meet the relatively low threshold for commonality under Rule 23(a)(2), Pet. App. 43a, described the issue of exposure and its harmful consequences as "settled long ago."[33] Pet. App. 40a, *citing In Re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied sub nom., Celotex Corp. v. School Dist. of Lancaster*, 479 U.S. 852, and *National Gypsum Co. v. School Dist. of Lancaster*, 479 U.S. 915 (1986).

On the other hand, as the Third Circuit concluded, absent consideration of the Settlement, "the number of uncommon issues in this humongous class action, with perhaps as many as a million class members, is colossal." Pet. App. at 42a. The legion of uncommon factual issues encompassed by the proposed class are manifest in that the Settlement covers all forms of asbestos disease, despite their differing pathologies,

[33] The Third Circuit identified a few other common issues, such as defendants' knowledge of the hazards of asbestos, whether they adequately tested their products or if they offered adequate warnings accompanying their products. Pet. App. 40a.

causes and degrees of injury. For example, mesothelioma, perhaps the worst form of asbestos disease, has but a single cause (exposure to asbestos), unlike lung cancer, which has been linked to other causes. Pleural thickening usually causes no physical impairment at all, while mesothelioma ensures swift and certain death. As the Third Circuit noted, "[s]ome class members suffer no physical injuries or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma. . . Each has a different history of cigarette smoking, a factor that complicates the causation inquiry." Pet. App. 41a. The Third Circuit further noted that "[i]t is unclear whether they will contract asbestos related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." Pet. App. 41a.

These uncommon factual situations may lead to significant legal differences with respect to affirmative defenses, causation, comparative fault, and the types of damages available to each class member. Pet. App. 41a.

Finally, and critically, the proposed class ignores the substantive and procedural differences among the states.[34] State laws differ on a variety of issues relevant to class member claims: "availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury; causation; the type of proof necessary to prove asbestos exposure; statutes of limitations; joint and several liability; and comparative/contributory negligence." Pet. App. 41a-42a. Moreover, these differences are not mere abstractions—the claims of class members and defenses thereto, and the values of their claims, are directly tied to such state law and procedural differences, as is graphically reflected by the substantial inter-state variation in settlements and judgments in asbestos cases. *See* JA 572-578, 562, 464-468. Such variations in state law and procedure "swamp any common issues and defeat predominance." *Castano*, 84 F.3d at 741. *See also In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir 1996); *cf. Walsh v. Ford Motor Co.*, 807 F.2d at 1017 (state law variations may defeat predominance unless major factual issues are "identical or virtually so"); *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir. 1986) ("extensive analysis" demonstrated state law differences fall within four categories in property damage action).

The Third Circuit correctly found that, given the large number of uncommon issues that are present, predominance cannot be established. *See Castano*, 84 F.3d at 742 n.15 (discussing difficulty in establishing predominance and comparing to problems described in Third Circuit decision in this case). Indeed, substantially more cohesive proposed classes have failed the Rule 23(b)(3) predominance test. *See, e.g., Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 570-71 (E.D. Tex. 1974).

A finding of lack of predominance for this immense and immeasurable class does not mean that more narrowly tailored classes would not meet the Rule 23(b)(3) predominance test. A class may be defined in an infinite number of ways.[35] The

[34] Such state law differences cannot be ignored. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985) (constitutional limitations on choice of law apply even in nationwide class actions); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-80 (1938) (federal court sitting in diversity jurisdiction must apply common law of the state in which case would normally be tried rather than general federal common law). It is the duty of class proponents to establish, through "extensive analysis," that state law differences do not undermine the predominance of class issues. *In re School Asbestos Litig.*, 789 F.2d at 1010. Such an assertion cannot be accepted "on faith." *Walsh v. Ford Motor Co.*, 807 F.2d at 1016. *See also Castano*, 84 F.3d at 742 (state law differences must be examined by district court).

[35] In this case, there has been no showing that state law differences fall within a few patterns. *See, e.g., In re School Asbestos Litig.*, 789 F.2d at 1010. Nor were narrower geographic classes explored. For example, a more focused action, limited to a single state or group of states with similar substantive and procedural rules, would present substantially fewer individualized issues. In this regard, it bears noting that settlements

scope of the class will, however, directly impact the degree to which common issues predominate. In this case, petitioners' reach greatly exceeded the permissible grasp of Rule 23(b)(3).

B. The District Court Improperly Approved Rule 23(b)(3) Class Treatment Where Meaningful Notice and the Right to Exclusion Were Not Provided

The lack of predominance of common issues, which resulted in a proposed class that lacked any cohesion, meant that many disparate class members were swept up by a settlement that imposed a resolution of their future claims. This obvious mischief might have been partly alleviated if there were a meaningful method by which class members could exclude themselves from the Settlement, specifically through the mandatory Rule 23(b)(3) opt-out right. Instead, the Settlement exacerbated the lack of class cohesion by providing for a largely illusory process for receiving notice and exercising exclusion rights. Accordingly the district court should not have certified this action as a Rule 23(b)(3) class.[36]

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from a handful of states account for a large portion of the petitioners' past liability. *See* JA 562, *et. seq.* (showing that claims from California, New York, Pennsylvania and Texas account for 50% of all CCR settlement payments).

[36] The Third Circuit explained that the class definition and the terms of the Settlement raised serious questions regarding whether adequate notice and opt out rights were provided to the class. Pet. App. at 31a, 56a-57a. While it declined to base its holding on the sufficiency of the opt-out notice under Rule 23(c)(2), it concluded that the notice problems *in this case* demonstrated that the Rule 23(b)(3) superiority requirement had not been met. *Id.* at 55a-57a. Its analysis, as well as our Rule 23(c)(2) analysis, considers the terms of the Settlement and the class definition. Whether the notice problem is analyzed as a Rule 23(c)(2) or superiority issue, it remains clear that the certification of *this* case as a (b)(3) class was improper.

1. Ensuring Adequate Notice and Opt-Out Rights in a Rule 23(b)(3) Action Involving Future Claims Requires Close Scrutiny

In evaluating certification of any Rule 23(b)(3) class—whether a litigation or settlement class—a district court must find that each class member will receive meaningful individual notice and the right to opt-out. *Eisen*, 417 U.S. at 176. This requirement must be met even where predominance and superiority have already been established. *See* discussion *supra*, Section I.B.3. The right to individual notice and opt-out is an integral component of the Rule 23(b)(3) balance; it ensures that the desired efficiencies that may be accomplished through class treatment do not subsume the equally important right of any individual class member to control his or her legal claim. The demanding requirement of notice and opt-out rights cannot be relaxed in the context of a settlement. *See* discussion *supra*, Section I.B.3.

Rule 23(b)(3) settlement classes that seek to bind *future* class members present the most difficult issues of notice and opt-out and demand the most careful review. For future class members to actually receive meaningful notice of a right to opt-out of a settlement—whether through individual or published notice—they must be susceptible to identification and they must be in a position to make an informed choice about whether to opt-out. Otherwise, notice in any form to the class is nothing more than "a mere gesture." *Mullane*, 339 U.S. at 315. As a leading class action commentator noted:

> For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right with a court designated period of time, (if opt-outs are permitted for other known members), *is of no beneficial use*.

1 *Newberg on Class Actions*, § 1.23 at 1-55 (emphasis added). Indeed, the *Manual for Complex Litigation, Third* (Federal

Judicial Center 1995) highlights the particular concern raised by settlement classes:

> The court should consider the impact of the settlement on persons who may not currently be aware that they have a claim or whose claim may not yet have come into existence. Since they cannot be given meaningful notice, they may be particularly prejudiced by the settlement, and *their opt-out rights (in a Rule 23(b)(3) action) may be illusory*.

Id. at 244 (emphasis added).

Even assuming that future class members may be identified, the notice inquiry is still not complete. The court must also ascertain whether future class members—who do not know if and to what extent they may later suffer injury—have sufficient information to evaluate their choices and meaningfully exercise their rights to exclusion. While class members in both litigation and settlement classes are often required to exercise opt-out rights based upon incomplete or imperfect information, the court must nonetheless determine whether—in the particular factual circumstances—there is sufficient information to meaningfully exercise opt-out rights.

2. Notice and the Right to Opt-Out Are Illusory in this Case

The Settlement defines a class, which includes all persons who in the future will get one or more of a number of asbestos related diseases from occupational exposure caused by one or more of the 21 CCR companies *as well as their family members* (who will either contract an asbestos disease themselves or will have wrongful death claims for the individual who was occupationally exposed). Rule 23(b)(3) requires that each of the members of this enormous and amorphous class receive the best practicable notice. *Eisen*, 417 U.S. at 176.

Since it is impossible to predict at the present time who will get any asbestos disease, and even harder to predict who will get *which* asbestos disease, class notice of necessity had to aim broadly to reach all who might potentially fall victim to any asbestos-related disease. The district court estimated that nearly seven million people received individually delivered notice. Pet. App. 219a, 267a.

Because of the unique factors present in this case, what appears at first blush as extensive notification is, in fact, legally insufficient. To begin, many who have been occupationally exposed to asbestos may no longer be working in the related industries and would not have received individual notice triggered by their employment status. Even if they had received notice—either through mail or publication—they may not recall exposure that has occurred long in the past. Their family members (who may not have even known the future victim at the time of exposure) will be even less likely to receive mailed notice or to self-identify as a class member.

The problem of effectuating notice is particularly acute for those who will ultimately get mesothelioma, which may result from slight exposure forty years in the past, *see* JA 335. The future class member may be entirely unaware of the exposure. He or she may not currently work—or have ever worked—in the asbestos-related trades. As a result, the class member is also unlikely to have received mailed individual notice. If he or she happened to see one of the published or broadcast notices that ran during the eight-week notice period, he or she will have little reason to believe that his or her rights will be affected by a pending lawsuit.[37] As the Third Circuit con-

[37] Asbestos diseases, and particularly mesothelioma, are relatively unique because of their long latency period and the risk from incidental exposure. This is, for example, quite different from other mass tort cases such as those involving breast implants or heart valves, where the potential victims can self-identify (one would expect an individual to know if either had been implanted) or be tracked through medical records or manufacturers' sales records. In those cases, class members who have not yet manifested injury must still make hard choices but they will do so with

cluded, because a person may contract mesothelioma based on slight or incidental exposure which occurred fifteen to forty years ago, "it is unrealistic to expect . . . every [exposed] individual to realize that he or she could someday contract a deadly disease." Pet. App. 56a. For the family members of a future mesothelioma victim, the connection becomes impossibly attenuated.

But this is not the end of the problem. Even assuming a putative class member did, in fact, receive a notice in this case, it is inconceivable that he or she could comprehend the vast complexity of the Settlement's provisions, calculate the probabilities and consequences of contracting one of many asbestos diseases, and make a meaningful decision whether to opt-out, all within less than 12 weeks.

The Settlement agreement encompasses the full range of asbestos diseases—from pleural thickening to mesothelioma. The settlement notice specifies technical and detailed medical proof requirements for each separate disease that must be met to qualify for compensation. JA 227 *et. seq*. The Settlement includes separate dollar value ranges for different diseases but provides virtually no information from which a class member can determine where in the range their potential claim would fall. The Settlement limits the number of claims in each disease category that may be processed each year. While these "flow rates" will affect how quickly a claim may be processed within the settlement resolution process, the likely number of claims (particularly since the size of the class is unknown) would be a mystery to the class member, who could not begin to determine whether his claim would be reached in year one, year ten, or never.

But, even assuming that the class member diligently read and comprehended the Settlement's contents, he or she must

much greater information about the range of options that they have. Thus, a ruling that notice is impossible for all or part of the present class will not impede the future evolution of class action methods to resolve many mass torts.

also attempt to predict which disease or diseases he or she might get, and then assess whether the offered damage ranges are reasonable.[38] The reasonableness of the damage ranges, however, turns on a comparison with the values obtainable by litigation or settlement in the jurisdiction in which the class member resides. This latter assessment is complicated still further by the impossibility of predicting *when* one will fall ill—another critical question since the Settlement provides for no inflation adjustment during the first ten years and then only a single modest adjustment thereafter.

The significance of the exclusion decision cannot, moreover, be underestimated. For mesothelioma victims in particular, remaining in this class may be of immense and catastrophic consequence since "[t]he [S]ettlement relegates those who are unlucky enough to contract mesothelioma in ten or fifteen years to a modest recovery, whereas the average recovery of mesothelioma plaintiffs in the tort system runs into the millions of dollars." Pet. App. at 49a. Moreover, resolution of their claims under the Settlement may be delayed by its flow rate limitation, while under state law, their claim might have priority for adjudication. *See, e.g.*, Cal. Code Civ. Pro. 36(d). Those who suffer the devastating and fatal consequences of mesothelioma have the strongest interest in pursuing their own individual litigation and will have no trouble finding attorneys willing to prosecute their claims. Indeed, the Advisory Committee anticipated that "[t]he interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action." Advisory Committee Notes, 39 F.R.D. at 104-05.

[38] Historically, only about 3% of all claims against CCR defendants were for mesothelioma, and a bit more than 4% for lung cancer. JA 570, 580. Thus, while the potential class targeted for notice is exceedingly large, only a relatively small proportion of the class will fall victim to these asbestos cancers. For most class members, the remote possibility of fatality will likely not figure into their consideration of the notice.

These overwhelming inadequacies of notice are exacerbated by the Settlement itself, which required that the right to opt out be exercised precisely at the point at which most individuals had the least information or incentive to make such a choice—before diagnosis of any asbestos-related disease. Yet the class definition and the complexity of the Settlement make it very unlikely that potential mesothelioma victims will appreciate the impact of the Settlement. Had the Settlement, instead, provided a meaningful right to opt-out after the onset of any disease, it would have done much to alleviate these serious notice problems. Pet. App. 56a. Instead, the Settlement limits the number of mesothelioma victims nationwide who may exit to the tort system to a maximum range of nine (9) to fourteen (14) individuals annually, only 2% of an already capped number of such claims that may be resolved each year.

Thus, as the Third Circuit summarized, the notice is problematic for undiagnosed plaintiffs because: (1) "[such] plaintiffs may not know that they have been exposed to asbestos within the terms of this class action;" 2) even if aware of their exposure, these plaintiffs who suffer no physical injuries, have little reason to "pay attention to class action announcements;" and 3) "even if class members find out about the class action and realize they fall within the class definition, they may lack adequate information to properly evaluate whether to opt out of the settlement." Pet. App. 55a-56a.

In contrast to the Third Circuit's careful analysis, the district court summarily rejected the concern that potential class members would be unable to self-identify or evaluate their risk of future injury and thereby receive meaningful notice and the right to exclusion.[39]

[39] The district court made only the following unsubstantiated conclusion:

> I am satisfied, however, that after more than 20 years of extensive litigation, over 15 bankruptcies (many with extensive notice) and massive publicity about asbestos, persons who have had occupational exposure to asbestos are aware of that exposure.

JA 311. The district court ignored the fact that the class included not just those with occupational exposure but family members of those with occupational exposure. Its conclusion was particularly unfounded for mesothelioma victims, where exposure may have been caused by washing the household laundry, or living with a parent who was exposed to asbestos in the workplace. JA 335.

To support its decision, the district court relied primarily on bankruptcy cases, which permitted notice to future asbestos victims. These cases are particularly inapposite since they involve bankruptcy procedures where notice and the right of exclusion are *not* mandatory (as they are in Rule 23(b)(3) classes). Moreover, as with Rule 23(b)(1)(B) limited fund cases, due process requirements may differ where a unitary resolution is mandated. *See In Re Asbestos Litigation*, 90 F.3d at 986-87.

The district court also relied on the decision in *In re "Agent Orange" Prod. Liab. Litig. ("Agent Orange I")*, 818 F.2d 145, 154, 168-69 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988), which is similarly distinguishable. Unlike mesothelioma victims, absent class members in *Agent Orange* had sufficient information to self-identify. The class included only Vietnam War veterans, spouses, parents, and children born before January 1, 1984. Claimants knew that they were Vietnam veterans and potentially affected by the settlement, when they learned of it through mail or published notice. Also unlike mesothelioma claims, the *Agent Orange* claims were legally weak and therefore worth very little. *In re "Agent Orange" Prod. Liab. Litig. ("Agent Orange II")*, 996 F.2d 1425, 1436-37 (2d Cir. 1993), *cert. denied sub nom, Ivy v. Shamrock Chemicals Co.*, 510 U.S. 1140 (1994). Finally, the district court treated the class settlement as functionally a limited fund case. After 2500 class members opted out pursuant to a Rule 23(b)(3) settlement notice, the district court granted summary judgment against all of the opt-out plaintiffs on the issues of causation and the military contractor defense. The district court, with the approval of the parties, then took the unprecedented step of allowing all the opt-out claimants to *rejoin the class and share in the settlement fund*. *See In re "Agent Orange" Prod. Liab. Litig.*, 689 F.Supp. 1250, 1261-63 (E.D.N.Y. 1988). The extraordinary facts and circumstances of the *Agent Orange* saga render that case *sui generis*.

Petitioners may argue that Rule 23(c)(2) requires individual notice only to class members "who can be identified through *reasonable* effort." Fed.R.Civ.Pro. 23(c)(2) (emphasis added). Given that notice was mailed to 6.8 million households, Pet. App. 267a, they may contend that reasonable

efforts have been exercised. *See* Pet.Br. at 48-49 n.25. But, the notice issue presented in this case is not whether the parties have exercised reasonable efforts to deliver a notice document to known class members. This is not, for example, about whether some class members have moved and cannot be traced to a new address. Instead, the problem here is that petitioners have defined a class that includes millions of Americans who have been exposed to asbestos within the definition of the Settlement but may not be aware of their exposure and are unlikely to receive or appreciate notice. Even if they do, class members cannot know what disease might lie in store for them, when they will get sick, how many years they will have to wait for claim processing and payment through CCR, or what their claim might to worth in court or through settlement. A class member could well conclude that the settlement would be acceptable if he developed a pleural plaque next year, but not if he developed mesothelioma in five years. Indeed, he could get *both*, yet he has to decide to either stay in or opt-out before falling victim to either. These people, who represent the vast majority of the class, *cannot* receive meaningful notice and intelligently decide whether to opt-out because of the very nature of this Settlement. Consistent with Rule 23(b)(3)'s purpose of providing for meaningful individual control of claims, where notice and opt-out rights are illusory, a class simply cannot be certified. *See* Advisory Committee Notes, 39 F.R.D. at 104-05.

CONCLUSION

Even though the Third Circuit erred in its broad pronouncements on general principles of class action law, on the basis of its actual examination of this case and this record, the Third Circuit correctly concluded that the proposed class failed to meet the predominance requirement of Rule 23(b)(3) and failed to provide adequate notice to class members of their right to opt out. Therefore, its judgment should be affirmed.

Respectfully submitted.

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